UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

THE HERTZ CORPORATION Employer

and

CASE 11-RC-6674

TEAMSTERS LOCAL 71, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

Jasper C. Brown, Jr., Esq., for the Regional Director. Charles P. Roberts, III, Esq., for the Employer. James F. Wallington, Esq., for the Petitioner.

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATION ON OBJECTIONS

MARGARET G. BRAKEBUSCH, Administrative Law Judge.

I. Preliminary Statement

In July 2007, Teamsters Local 71, a/w International Brotherhood of Teamsters (the Petitioner or Union) filed a representation petition with Region 11 of the National Labor Relations Board (the Board or NLRB), docketed as Case 11-RC-6674, seeking to represent certain employees of The Hertz Corporation (the Employer).

On July 26, 2007, the Regional Director for Region 11 approved a Stipulated Election Agreement directing an election to be held in the following unit of the Employer's employees (the Unit):

All full-time and regular part-time vehicle service attendants employed by the Employer at its Charlotte Airport, North Carolina facility; but excluding all other employees, counter sales representatives, courtesy bus drivers, instant return representatives, mechanics, office clerical employees and guards,

professional employees and supervisors as defined in the Act.

Pursuant to the Stipulation Election Agreement, a secret ballot election was conducted on August 30, 2007. The results of the election, as disclosed by the Tally of Ballots served upon the parties at the conclusion of the election, were as follows:

10	Approximate number of eligible voters:	30
	Number of void ballots	0
	Number of votes cast for the Petitioner	17
	Number of votes cast against participating labor organization	12
	Number of valid votes counted	29
	Number of challenged ballots	0
	Number of valid votes counted plus challenged ballots	29

15 The challenges were not sufficient in number to affect the results of the election.

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On September 6, 2007, the Employer filed timely objections to conduct affecting the results of the election. On September 25, 2007, the Regional Director for Region 11 of the Board issued an Order Directing Hearing and Notice of Hearing, finding that the Employer's objections raise substantial and material factual issues, including, but not limited to, issues of credibility which may best be resolved by hearing before an Administrative Law Judge. The Regional Director's Order directed that a hearing be held on the Employer's Objections and that the designated Administrative Law Judge prepare and cause to be served upon the parties a report resolving questions of credibility, and containing findings of fact and recommendations to the Board as to the disposition of the issues. A hearing was held and conducted on November 5, 2007, consistent with the Regional Director's September 25, 2007 Order.

All parties were represented at the hearing and were afforded full and complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.

In accordance with the Regional Director's Order, and based upon the record as a whole, and after considering the arguments by the parties, I make the following findings of fact and credibility resolutions¹ and issue this report with recommendations to the Board.

II. The Objections

A. Text of the Employer's Objections

The text of the Employer's Objections is as follows:

In making credibility determinations, I have considered the weight of the respective evidence, the demeanor of the witnesses, inherent probabilities, and reasonable inferences drawn from the total record evidence.

Objection 1.

During the critical period, including while the election was in progress, Union officers, agents, and supporters engaged in numerous acts that were threatening, intimidating, abusive, physically assaulting, and otherwise coercive. These acts occurred in the presence of voting unit employees or otherwise were disseminated to voting unit employees, thereby interfering with and precluding a free and fair election.

Objection 2.

During the critical period, including while the election was in progress, Union officers, agents, and supporters formed a gauntlet through which employees were required to walk as they approached the voting area. These acts occurred in the presence of voting unit employees or otherwise were disseminated to voting unit employees, thereby interfering with and precluding a free and fair election.

The Employer's objections initially included a third conclusionary objection. The Employer withdrew this objection at hearing.

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B. Background and Undisputed Facts

The Employer operates a car rental facility at the Charlotte Douglas International Airport in Charlotte, North Carolina. The Union, seeking to represent the vehicle service attendants (VSA's), has also been the certified collective bargaining representative for the Employer's counter sales representatives (CSR's) and the Employer's courtesy bus drivers at the Charlotte facility since March 16, 2006. On October 31, 2006, the Employer and the Union signed a collective bargaining agreement covering the CSR's and the courtesy bus drivers. The agreement remains in effect until May 4, 2009.

At the time of the August 30, 2007 election, John Kreitner was employed by the Employer as the Human Resources Manager for the Southeast Region. Stacy Snyder served as the Employer's Area Human Resources Manager.

The August 30, 2007 election was conducted in two voting sessions. The first voting session ran from 10:00 a.m. to 12:30 p.m. and the second session ran from 3:00 p.m. to 5:30 p.m. Employee Sylvester Challenger served as the Employer's observer for the morning election session and Al Little was the Employer's observer for the afternoon election session. There was no Union observer for either election session.

During the course of the hearing, the Employer introduced into evidence a diagram of the Employer's Charlotte, North Carolina facility. The diagram shows the Employer's main customer service building containing the lobby area and the public entrance from the courtesy buses. The diagram also depicts the break room in the main building that was used as the designated voting area. The break room is located off a hall that runs the width of the building with exit doors at both ends of the hall. There is another hallway that runs perpendicular to the long hall and connects the long hall to the lobby area.

Throughout the course of the hearing, no witness was able to testify with certainty as to the geographic directions of the diagram. Consequently, there is no record evidence as to what constitutes north, south, east, or west on the diagram as related to witness testimony. For the benefit of the reader of this report, the diagram is viewed as looking at the front of the Employer's main building. Thus, the area that is described as the Gold Booth area is located to the left of the main building. The area that is described as the vehicle service area is located to the right of the main building. Stacy Snyder testified that the break room is approximately 32 feet from the outside door exiting the building toward the Gold Booth area. The entrance to the break room is also approximately $26\frac{1}{2}$ feet from the door exiting the building toward the vehicle service area where the VSA's clean and fuel the vehicles. The distance between the vehicle service area and the building is approximately 72 feet.

C. Employer Objection One

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During the critical period, including while the election was in progress, Union officers, agents, and supporters engaged in numerous acts that were threatening, intimidating, abusive, physically assaulting, and otherwise coercive. These acts occurred in the presence of voting unit employees or otherwise were disseminated to voting unit employees, thereby interfering with and precluding a free and fair election.

1. Facts

a. The Incident Involving Susino and Russell

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(1) The Employer's Evidence

William Susino is the Employer's Area Revenue Manager. As of August 30, 2007, Susino had only been assigned to the Employer's Charlotte, North Carolina facility for approximately one month. On the day of the election, Susino was instructed to greet Union President Ted Russell and escort him to the break room where the election was to be held. He testified that he was given no other instructions about policing the area. Normally, Susino did not have any responsibility or involvement in labor relations matters.

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Susino had not previously met Russell and he had been given only a brief description of his appearance. Susino waited for Russell at the entrance gate as he had been told that Russell would park next to security. As he waited, he observed a man drive through the incident return area and then around the VSA area and the back of the building. The man ultimately parked by the Gold Booth Area. Susino walked around the back side of the building and approached the man. He recalled that he asked the man if he could help him and the man replied that he could not. Susino recalled that when he pointed out to the man that he parked in an Employer parking area, the man then introduced himself as Russell. Susino explained that he too introduced himself and explained that he was to escort Russell to the pre-election conference. Susino asserted that Russell simply walked away from him. Even though Susino again told Russell that he needed to take him to the meeting, Russell began talking with CSR Penny Wallace outside the entrance to the facility. When Russell finished

his conversation with Wallace, Susino told Russell that he was late for the pre-election conference and Susino attempted to direct Russell toward the outside door leading to the long hallway and toward the area of the pre-election conference. Susino recalled the time as 9:40 a.m. and the pre-election conference was to have begun at 9:30 a.m.

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Rather than going to the outside door that would lead to the long hallway and toward the break room, Russell walked toward the door leading to the lobby or main customer check in area. Susino testified that when Russell grabbed the door handle, he asked Susino if there were any "Union representatives" inside the building. Susino replied: "Probably, yes." Russell responded: "Then don't get in my fucking way then." As Russell opened the door, he hit Susino with the door. Susino explained that he was standing with his left side next to the door. Russell grabbed the door with his right hand and pulled the door open. Susino testified that he did so with such force that the door hit him in the left side, hitting both his shoulder and his leg. Susino also recalled that the door was actually pulled over his left foot and he was knocked backward in the process. Susino explained that he did not move out of the way of the door because he did not expect the door to open so guickly. He also explained that he had been in front of the door because he was trying to direct Russell to the door leading to the break room. Susino recalled that Russell walked into the lobby area and spoke with CSR Monica Moore who was working behind the counter. Russell then walked through the customer service area, passed the employee clock-in area, and then finally down the side hall that also lead to the break room.

Susino testified that later in the morning a "couple of people" noticed that he was favoring his left side and asked him if he were all right. He recalled that at approximately 11:00 a.m., CSR Monica Moore asked him about his shoulder and he mentioned that he had been hit by the door. When she asked who had hit him, he told her Russell. At that time, Wallace was walking near to them and interjected: "Yeah, I saw that and Naomi saw that as well." Susino did not testify as to the identity of "Naomi."

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Susino also recalled that shortly after noon, he had a conversation with VSA Al Little in which he told Little what happened to his shoulder. Little confirmed this same conversation. After speaking with Susino, Little went to Snyder's office to check with her again about his duties as an observer for the afternoon election. While in Snyder's office Little spoke with his supervisor, Albert Massey. During the conversation with Massey, Little again heard about the incident involving Susino and Russell.

(2) The Petitioner's Evidence

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Russell testified that during the two days prior to the election, he held a shop steward election involving another employer. He described himself as "pretty well blistered out" and "dragging" on the day of the election because of the lack of sleep. Russell explained that upon arriving at the facility on August 30, he saw Susino. At the time, he did not know who he was and didn't really look at him. Arriving at approximately 9:20 to 9:25 a.m., he believed that he had enough time to go into the front lobby and to speak with some of the CSRs that he represented. Russell explained that it is his custom to speak with his members when he is at the facility.

As Russell started toward the lobby door, he heard someone shouting to him. The man who he later learned to be Susino asked him if he could help him. Russell simply told him "No." Although he was wearing his union shirt, the man asked his name. After Russell identified himself, Susino told him that he had to go into the building at a different door. Russell remembered telling Susino that he did not have to go in the door that Susino directed. He told Susino that he had some people with whom he wanted to speak. He told Susino that he knew where the meeting was being held and that he would go around to the meeting. Russell testified that Susino insisted that he use the other door to the building.

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Russell acknowledged that he used profanity and recalled that he asked Susino: "Who the 'f' are you?" After Susino identified himself as "Bill," Russell continued down the sidewalk; telling Susino that he was going in the door leading to the lobby. Despite Susino's protests, Russell walked passed him and continued toward the lobby door. Russell asserted that when he reached the lobby door, Susino walked in front of him and stood before the door. Russell testified that he reached for the door with his left hand and pulled it approximately 10 inches open. He recalled that Susino shoved back against the door, causing Russell to lose his grip on the door handle. Russell explained that he again reached for the door more forcefully and when he opened it, he moved both the door and Susino. Russell acknowledged that when he did so, he was angry. He testified: "I'm not used to being challenged like that. I've got a right under Article 6 of the collective bargaining agreement to come on that property and speak to my members at any time." Russell walked into the customer service area and spoke with two of the CSRs who were on duty. No VSAs were in the lobby at the time that he entered. From the lobby area, he proceeded through the smaller hallway leading to the long hallway and ultimately to the break room.

Prior to the hearing, the Petitioner subpoenaed the video tapes of the Employer's surveillance cameras in the vicinity of the voting area. The tape that recorded the lobby of the customer service area depicted Russell walking through the lobby at 14 seconds after 9:43 a.m. Susino was walking approximately five to six feet behind him. The parties viewed the tape and the Employer's manager, Gregory Wilson, testified that both Russell and Susino appeared to be walking at a normal pace. They were both walking through the lobby from the left side of the building to the right side of the building.

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b. The Incident Involving Russell and Kreitner

(1) Employer's Evidence

Kreitner testified that as Human Resources Manager for the Employer's Southeast Region, he had known Russell prior to the day of the election. Kreitner had worked with Russell during the contract negotiations for the CSRs and the courtesy bus drivers during the previous year. Prior to the August 30, 2007 election, Kreitner had also spoken with Russell about who would be designated as a Union observer for the election. When Russell told Kreitner that he wanted to use a shop steward for the CSR bargaining unit, Kreitner objected. Kreitner told Russell that he could not use the shop steward because the individual would be a union official.

Kreitner recalled that he went to the pre-election conference around 9:30 a.m. When Russell arrived for the conference between 9:30 and 9:45, the only individuals present were Kreitner, Employer observer Sylvester Challenger, Stacy Snyder, and the NLRB agent. Kreitner was standing in the break room door leaning on the door frame with his back to the entrance. As Russell entered the room, Kreitner felt a "hit" in his lower back. When he turned around, he saw Russell and spoke to him. Susino confirmed that Russell hit Kreitner in the lower back with an open hand. He recalled that Kreitner stumbled forward and appeared stunned as he turned around to see Russell. Kreitner recalled that Russell responded: "If you have somebody tail me again you son-of-a-bitch, I'm going to slap a charge on your ass." Snyder testified that she overheard Russell telling Kreitner: "Don't you ever have anyone tail me again and tell me where to park you son-of-a-bitch, or I'll slap charges on your ass." Sylvester Challenger testified that after Kreitner spoke to Russell, Russell responded: "Whenever I am on this lot, nobody tells me where to park." Both Kreitner and Snyder recalled that the Board Agent interjected and cautioned Russell about his language. Challenger recalled that the Board Agent told Russell to calm down. Kreitner then again greeted Russell.

(2) The Petitioner's Evidence

Russell concurred that he had worked with Kreitner during the contract negotiations for the CSRs and courtesy bus drivers in 2006. Prior to the election concerning the VSAs, Russell told Kreitner that he wanted to use CSRs Harper and Wallace as his election observers. Kreitner had objected on the basis that they were both union stewards covered by a collective bargaining agreement. In a telephone conversation prior to the election, Board Agent Sandra Grier also told Russell that he could not use the stewards as observers if the Employer objected. Russell chose to use no observers.

Russell does not deny that when he entered the break room prior to the pre-election conference, he hit Kreitner who was standing in the doorway. He recalled that he used the back of his hand and that Kreitner moved forward. Russell denied that his touching of Kreitner was either a slap or a shove. He described it as a flip of his hand on Kreitner's back. While he asserted that he would have done the same thing to anyone else blocking the doorway, he acknowledged that he was "irked" because of his interaction with Susino. He recalled that as Kreitner turned around to face him, he was smiling.

Russell admitted that once Kreitner turned around, he (Russell) "unloaded on him." Russell recalled telling Kreitner: "Don't you ever have another SOB challenge me when I come on this property, or get in my face and tell me I can't do something. I've got a right under this bargaining agreement to be here. If you do, I will file a labor charge so far up your ass that you'll be sneezing it." Russell recalled that after the Board Agent told him to calm down, the incident was over and the pre-election conference began.

c. Discussion

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The Employer asserts that Russell's conduct on the morning of the election constitutes

not only objectionable conduct, but also conduct that is violative of Section 8(b)(1)(a) of the Act. Citing Sea Breeze Health Care Center, Inc.,² 331 NLRB 1131, 1133 (2000), the Employer maintains that it is the Board's policy to direct a new election in cases where unfair labor practices have occurred during the critical pre-election period, unless the conduct is so de minimis as to warrant a finding that it did not impact on the election results. In its post-hearing brief, the Employer cites the Board's decisions in District 20, United Mine Workers of America,³ 192 NLRB 565, 566 (1971) and Teamsters Local 115 (Oakwood Chair),⁴ 277 NLRB 694 (1985) where restraint and coercion directed against supervisors and managerial personnel were found to violate Section 8(b)(1)(a) of the Act inasmuch as the conduct became or was sure to become known to employees in the course of a strike.

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The Employer also asserts that the Board's decision in Allou Distributors, Inc., 201 NLRB 47 (1973) supports a finding that a union's assault of a supervisor is violative of 8(b)(1)(a). In Allou, the employer prepared, circulated, and caused a certification petition to be filed in violation of 8(a)(1) and then withdrew recognition in violation of 8(a)(5). The Board also found that the union violated Section 8(b)(1)(a) of the Act by its coercion and threats to employees during the campaign period. During the course of the campaign, two union business agents assaulted a management official outside the presence of employees. Although the administrative law judge did not find the conduct violative of the Act, the Board noted that the management official told employees about the assault and showed them the red The Board opined that inasmuch as the assault took place in marks on his face. circumstances wherein employees would be reasonably expected to become aware of the incident, such conduct violated Section 8(b)(1)(a) of the Act. The Board went on to explain that in light of the coercive conduct by both parties, a new election was appropriate. It is apparent therefore, that the facts of the *Allou* case are distinguishable from those of the instant case. In *Allou*, the union representatives' assault of the supervisor occurred in the midst of a bitter and heated election campaign in which the union threatened employees with economic injury and physical harm. It is reasonable that employees would be additionally threatened if they learned of the assault on a supervisor. Thus, unlike the circumstances of the instant case, such conduct would reasonably constitute a violation of Section 8(b)(1)(a).

The Employer also offers the Board's decision in *Hickory Springs Manufacturing Co.*, 239 NLRB 641, 642 and 644 fn. 21 (1978) in support of its argument that conduct in violation of Section 8(b)(1)(a) is conduct that interferes with the exercise of a free and untrammeled election choice. Although the Board affirmed that a violation of the Act during the critical period constitutes grounds for setting aside an election in its decision in *Hickory Springs*, the Board did not find the union's conduct to constitute 8(b)(1)(a) or to be grounds for setting

The Board found that the employer not only unlawfully interrogated and threatened employees, but also attempted to unlawfully poll its employees' union sentiments. The Board opined that in doing so, the employer not only engaged in unfair labor practices, but also sufficiently interfered with the election to require a new election.

The circumstances of this case involved threats to harm a foreman's wife and children in the presence of pickets.

The union was found to have violated Section 8(b)(1)(a) of the Act after agents of the union beat the employer's president, requiring 15 stitches in his scalp and 5 stitches on his face.

aside the election. The Board, in fact, went on to distinguish how the union's conduct may have had the opposite effect on voting employees. In *Hickory Springs*, the employer filed objections based upon statements made or adopted by union officials related to what actions the union would take in the event of a strike. While the statements threatened violence to individuals crossing the picket line, the statements did not involve any threats or hints of threats related to events concerning the election and were not calculated to coerce employees to vote for the union. The Board found that under these circumstances, it is "improbable that this type of verbal threat would have a coercive effect on the employees as to cause them to vote for the union." The Board explained that in order for conduct to warrant setting aside an election, the conduct must not only be coercive, but must be so related to the election as to have had a probable effect on the employees' action at the polls. Specifically, the Board noted that the employees had it within their power to blunt the threats entirely by voting in the secret ballot election against the union. The Board's majority opined that if there was an immediate effect of the union's conduct, it would be to cause employees to be repelled by the conduct and cause them to vote against the union.

In evaluating party conduct during the critical period, the Board applies an objective standard. Thus, conduct is found to be objectionable if it has "a tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Manufacturing Co.*, 316 NLRB 716, 716 (1995). The Board considers such factors as:

(1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.⁶

With respect to this objection, the Employer relies upon two incidents involving the Union's President within the 30-minute period prior to the election. The Employer further asserts the significance of the Union's margin of victory of only 5 votes in a bargaining unit of 30 employees. Certainly, all of these factors, including the closeness of the vote and the occurrence of the incidents on the day of the election, must be considered. Although the relative margin in the election results is a factor to be considered, the overall record does not support a finding that the alleged conduct was likely to cause fear among bargaining unit employees or was even of such import to be considered by employees.

Russell does not deny that he was angry when Susino stood in front of the lobby door

As the Employer points out in its brief, the case was overruled on other grounds in *Home & Industrial Disposal Service*, 266 NLRB 100, 101 (1983), when the union made threats to employees within an hour of the election

Cedars-Sinai Medical Center, 342 NLRB 596, 597 (2004).

and he acknowledges that when he jerked open the door, he moved Susino along with the door. Susino does not deny that when Russell opened the door, he was standing on the left hand side of the door and did not move. He explained that he had not expected the door to open as fast as it did. Based upon the testimony of both Susino and Russell, it appears that Russell used profanity and that Susino was struck by the door as Russell opened the door with some degree of force. There was, however, no evidence that anyone overheard their conversation at the door. Additionally, there is no evidence that the incident was witnessed by any bargaining unit employee. The only indication that the incident was observed by anyone was included in Susino's hearsay testimony. He testified that at approximately 11:00 a.m. on August 30, CSR Monica Moore asked about his shoulder and noticed that he was favoring it. When he told her that he had been hit by the door, she asked by whom. He recalled that as he responded that it was Russell, CSR Penny Wallace walked by him. He asserted that Wallace interjected: "Yea, I saw that and Naomi saw that as well." While Wallace did not testify or dispute this out-of-court statement, there was no record evidence to confirm the identity of "Naomi" or to confirm that the employee referenced by Wallace is a member of the bargaining unit. I also find it interesting that Moore asked Susino about what happened to his shoulder. There is no dispute that Moore was working in the lobby area when Russell entered and she was the first person with whom he spoke. The fact that she was in the same room as the door and was unaware of the incident certainly belies the significance or severity of the incident.

Only two bargaining unit employees testified that they were aware of any incident involving Susino and Russell prior to their voting on August 30, 2007. Employer observer Al Little recalled that Susino told him about the incident during the break between the first and second voting period. The only other individual who mentioned the incident to him was his supervisor. As the Employer's observer for the afternoon voting period, Little remained in the polling area for the entire election period. He did not discuss the incident with any other employees. Although VSA Sam Whitley testified that a few employees told him that Russell had raised "some sand," on the day of the election, he could not recall with whom he had spoken. Additionally, while he described Russell's conduct as "raising some sand," he did not explain what he meant by "raising sand" and he did not confirm that any employee told him about either incident involving Susino or Kreitner. The earliest that VSA Robert English learned of any incident involving a Union representative was the evening after he voted. While CSR Sara Weaver testified that on the day of the election, she had heard that there was some conflict between Russell and one of the managers, she could not recall from whom she had heard this. Thus, there was no evidence that she had heard about this "conflict" from any bargaining unit employee or that she had been told about Russell's using force or profanity with either Kreitner or Susino. More importantly, there was no evidence that she communicated this information to any bargaining unit employee prior to their voting.

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Employer observer Sylvester Challenger is the only bargaining unit employee who was present during the incident involving Russell and Kreitner. He recalled that at the time that Russell entered the room, he was standing on the other side of Snyder and was looking toward the ballot box. He only recalled that when Russell came in, Russell told Kreitner: "Whenever I come on this lot nobody tells me where to park." He recalled that the remark upset him because he assumed that one of his co-workers had mistakenly told him where to

park. He did not testify that he observed Russell's hitting Kreitner or even touching Kreitner. There was no evidence that Challenger told any other bargaining unit employees about Russell's comments or actions when he entered the voting area.

The Board has long held that an objecting party must show that the conduct in question affected employees in the voting unit and the test for determining whether there has been objectionable conduct is an "objective standard." *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997). *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). Thus, there must be evidence that bargaining unit employees were aware of the alleged coercive conduct. An objecting party must establish dissemination of the conduct upon which it relies in alleging interference with pre-election conditions. In a recent decision, the Board opined that even with such serious conduct as threats of plant closure, the objecting party has the burden of proving dissemination and its impact on the election by direct or circumstantial evidence. *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004).⁷

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The circumstances of this case are clearly distinguishable from those presented to the Board in Phillips Chrysler Plymouth, Inc., 304 NLRB 16 (1991). In Phillips, two union organizers spoke to bargaining unit employees on the morning of the day of the election. The employer's president informed the organizers that they could not enter the shop area until the 9:00 a.m. pre-election conference and asked them to wait in the reception area until that time. The union agents then engaged in a shouting match with the employer's president, claiming that they had a right to be there and that the election would be jeopardized if they were removed, and refused to leave even after the employer called the police. The Board set aside the election, noting that the incident occurred in front of all ten bargaining unit employees in their work area, and that such a "direct challenge to the employer's assertion of its property rights could not have been lost on the employees as they began to vote 75 minutes later." In the instant case, Russell did not refuse to leave the premises and simply chose to enter the facility through a public door that did not bring him into contact with bargaining unit employees. Only the CSRs who were already represented by the Union were present in the lobby area. Thus, there was no basis for VSA employees to reasonably conclude that the Employer was unable to protect its legal rights in a confrontation with the Union as found in Phillips. Chrill Care, Inc., 340 NLRB 1016, 1017 (2003).

There is no dispute that Article 6 of the existing collective bargaining agreement provides that union representatives are permitted to visit the workplace to talk with bargaining unit employees; providing that they report to a designated Employer representative upon entering the property or work space, and as long as such visits do not interfere with any aspect of operations. Such contract language obviously provides guidelines for a Union representative's unscheduled visit to the Employer's facility. In the instant case, the Employer was well aware of Russell's visit to the facility. Kreitner had not only spoken with Russell prior to the pre-election conference, but the specific time of his visit was anticipated by the Employer. Susino was dispatched to look for Russell and direct him to the election

Overruling its previous decisions in *General Stencils, Inc.*, 195 NLRB 1109 (1972); *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); and *Spring Industries*, 332 NLRB 40 (2000), in which the Board had presumed dissemination of plant-closure threats or other kinds of coercive statements.

site. The evidence indicates that upon arriving at the facility, Russell proceeded toward the break room and toward Kreitner; the company official with whom he had spoken prior to the pre-election conference. There is no dispute that Russell did not know Susino and had never previously dealt with him in a labor relations capacity or any other capacity. In making his way toward Kreitner and the election area, Russell chose to enter through the front entrance in order that he might speak to the CSRs and bargaining unit employees that he already represented. His decision to do so does not appear to be an interference with operations, a violation of the collective bargaining agreement, or conduct that would otherwise be objectionable.

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More significantly, the Employer has not demonstrated that Russell's interaction with either Susino or Kreitner was sufficiently disseminated to bargaining unit employees to have an effect on the election. Additionally, the record does not support a finding that the incidents would likely cause fear for the employees or would generate any persistence of the incidents in the employees' minds if known to employees. See *Reliable Trucking Inc.*, 349 NLRB No. 79, slip op. at fn. 2 (2007). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees" and the "burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Dairyland USA Corporation*, 347 NLRB No. 30, slip op. at 6 (2006).

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In determining the merits of Employer's Objection 1, I have analyzed all of the record testimony with respect to variances and apparent contradiction that is necessary for credibility resolutions. Surprisingly, there is more consistency than variance in the testimony of Susino, Kreitner, and Russell. There is no dispute that Susino was struck by the door when Russell opened it. There is no dispute that Russell used profanity with both Susino and Kreitner. There is no dispute that Russell touched Kreitner without warning as he walked into the break room. Although Russell describes the touching as more of a flip of his hand on Kreitner's back, Susino and Kreitner describe the touch as striking or hitting Kreitner in the back. All of the management and employees witnesses who testified concerning this objection appeared to testify credibly. They appeared to give relatively accurate accounts of what they heard and observed, limited only by normal lapses in recall and human predilection. Even with the relative consistency in testimony, however, I do not find merit in the Employer's Objection 1 for the reasons discussed above. The record as a whole simply does not support a finding that the conduct underlying Objection 1 is either violative of Section 8(b)(1)(a) of the Act or is conduct that interfered with the results of the August 30, 2007 election.

Accordingly, I recommend that this Objection be overruled in its entirety.

D. Employer Objection Two

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During the critical period, including while the election was in progress, Union officers, agents, and supporters formed a gauntlet through which employees were required to walk as they approached the voting area. These acts occurred in the presence of voting unit employees or otherwise were disseminated to voting unit employees, thereby interfering with and precluding a free and fair election.

1. The Employer's Evidence

Susino was also assigned to escort Russell back to his car after the pre-election conference. He recalled that after speaking with manager Gregory Wilson in the office, Russell again entered the main lobby and spoke with Union Steward and CSR Ken Harper. Russell continued his conversation with Harper as he walked out of the building to the bus pick-up area. They continued to talk as they walked to the side of the building between the check-in area and the Gold booth area. They were joined by Union Steward and CSR Penny Wallace. Susino recalled that Russell spoke with Wallace and Harper prior to his leaving the facility at approximately 10:08 a.m. Susino was standing approximately 10 feet away from them during the conversation. Susino confirmed that while Russell went into the main checkin area after the pre-election conference, Russell did not go near to the door where the VSAs would have entered the building if they were walking from the vehicle service area.

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Susino also recalled that Harper and Wallace walked to the vending machine area on the other side of the building and continued their conversation until approximately 10:12 a.m. The vending machine area is approximately three feet outside the building and near to the building's outside door that leads toward the VSA pump area. Susino did not see anyone entering the building during the time that Wallace and Harper spoke in the vending machine area. Additionally, he did not see Wallace or Harper speak to any VSAs during the time that they stood near the vending machines. Susino estimated that at approximately 10:12 a.m., Wallace went on break and Harper got into his car and left the facility.

Although VSA Robert English was on vacation on the day of the election, he came in to vote around 10:00 a.m. As he walked passed the vending machines on his way into the building, he observed Wallace near the vending machines. He did not remember that anyone was with her. She said nothing to him.

As lead VSA, Samuel Whitley works throughout the Employer's facility and is not limited to only the vehicle service area. Whitley recalled that on the day of the election and sometime between 10:00 a.m. and 1:00 p.m., he observed Harper and Wallace talking outside the building near the vending machines. Whitley could not recall with certainty how long Wallace and Harper talked. He went on to explain, however, that it wasn't a "big deal" because he knew that they worked there. Whitley recalled that while some people walked past Harper and Wallace, he could not recall their identity and he did not know if Wallace and Harper had spoken to the individuals.

Whitley also recalled that prior to talking with Wallace, he observed Harper walking around near the vehicle service area. Whitley recalled that he was not dressed in his usual work clothes and he was carrying a brief case. Although Whitley believed that Harper had spoken with someone while he was in the vehicle service area, he didn't know who it had been.

Sara Weaver works as a CSR in the Gold Booth section of the facility. It is undisputed that the Gold Booth section is located on the opposite side of the main facility from the vehicle service area. Weaver explained that the booth in which she works has a

glass window facing a door leading into the building. She took her lunch break between 10:00 and 11:00 on the day of the election. During her lunch break, Weaver recalled seeing Harper standing outside the main building. She recalled that he had been standing in an area that is half way between a door leading to the lobby and the door leading to the long hallway that ran the width of the building. He was facing the Gold Booth section and was turned away from the door leading into the hallway. She estimated that he may have been in that area for as long as 15 minutes. She did not recall that he was speaking with anyone in particular. Additionally, she did not recall how he was dressed or if he carried anything.

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2. The Petitioner's Evidence

Russell testified that after the pre-election conference, he spoke for approximately a minute with Employer Manager Gregory Wilson about a contract issue involving an employee in the other bargaining unit. Russell exited the building through the lobby and out the front door. He saw Harper outside and spoke with him. Because Susino was standing nearby, Harper introduced Susino to Russell. Russell recalled that he had laughed and told Harper that he had already met Susino and not under the most pleasant circumstances. Russell told Susino that there were no hard feelings and that he understood that Susino was just following directions. Russell added, however, "But just don't – don't get in my face and try to block me anymore." Russell told Susino that if he had a problem to go somewhere else. Russell looked at the time on his cell phone and saw that it was a few minutes before 10:00 a.m. He recalled telling Harper that the election would start at 10:00 and he didn't need to be there. As he walked to his car, he saw Wallace and spoke with her briefly. Russell testified that he had been through enough elections and he knew the rules. He explained that he knew not to be on the property when the election began.

Harper recalled that he arrived at the Employer's facility at approximately 9:55 on the day of the election. He denied that he carried any bag or brief case with him. When he arrived, he saw Russell talking with Kreitner and the Board Agent outside the main building on the Gold Booth section side of the building. By the time that he reached the area where Russell was standing, Kreitner and the Board Agent had already left that area. Harper spoke to Russell. While speaking with Russell, Harper saw employee Naomi Hopper and also Wallace. Harper also recalled that during this same time, he observed Susino and he introduced Russell to Susino. In describing this interaction, Harper testified that he and Russell walked toward the front entrance of the building. Harper testified:

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And we were approaching, going toward I think the front entrance, which we never got there, Bill was saying that we could not go in certain areas or certain locations. So, when we approached the area, I said, "Well, Bill, what's wrong?" I said, "I've never seen you in this type of a behavior." And he said well he's ordered to do his job, and we could not go within a certain area. I said, "Well, you know", I said, "I'm just here to make sure that there's fair play from the previous day' because there's a lot of things that happened the night before."

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Harper estimated that he spoke with Russell no more than 5 minutes. He

acknowledged that after Russell left the premises, he spoke with Wallace near the vending machine area for only about two to three minutes. He explained that he had to be at work at another job by 10:30 a.m. He recalled that as he began to leave, Susino questioned him as to where he was going. He told Susino that he was leaving to go to his car. He denied that he spoke with any VSAs while he was in the vending machine area. He further denied that he ever saw any gauntlet of Union supporters or any Union supporters talking with the VSAs.

Although VSA Robert Morrow was on vacation on the day of the election, he came to the facility at approximately 4:30 p.m. to vote. Other than his supervisor telling him that it was time to vote, he spoke with no one prior to voting or after voting. VSA Alioune Ladiane recalled that he voted prior to working second shift. He estimated that he arrived at the facility around 1:00 p.m. He did not speak with anyone prior to voting and he did not see any employees congregating outside the building doors. The parties stipulated that if called to testify, VSAs Kibula Mantano, Ngole Ngongo, and Joe Williams would give testimony similar to that of Morrow and Ladine.

VSA Eugene Walker, Jr. voted between 10:30 a.m. and 10:45 a.m. on August 30, 2007. Walker testified that he did not see a gauntlet of Union supporters or any individuals who blocked his way, attempted to give him materials, or talked to him on his way into vote. He did not see Russell anywhere on the property on the day of the election. The parties stipulated that if VSAs Rodney Adams, Curtis Mackay, Haywood Pegues, and Roger Slawson testified, their testimony would be consistent with that of Eugene Walker, Jr.

3. Discussion

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In its post-hearing brief, the Employer maintains that for a period of approximately 15 to 20 minutes at the beginning of the morning voting session, Wallace, Harper, and Russell positioned themselves outside the two side doors through which VSAs walked to get to the voting room. The Employer concedes that there is no evidence that any of these individuals engaged in extended conversations with voters and thus there is no issue of alleged electioneering. Kreitner, in fact, testified that he was present on the Employer's property during the entire election period. He acknowledged that he never observed Union officers, agents, or supporters forming a gauntlet through which employees were required to walk as they approached the voting area.

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The Employer asserts, however, that the issue is one of coercive monitoring and surveillance of the doors leading to the polling area. In support of its position, the Employer cites the Board's decision in *Electric Hose & Rubber Co.*,8 in which a supervisor unexplainably "stationed" himself outside the entrance to the voting area. The Board found such conduct objectionable, concluding that his purpose was to survey the union activities of the employees and to convey to the employees the impression that they were being watched. The Employer also points out that the Board set aside an election in *Performance*

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^{8 262} NLRB 186, 216 (1982).

Measurements Co., because of the continued presence of the company's president at a location where employees were required to pass in order to enter the polling area.

I find these cases distinguishable. The evidence in the instant case reflects that there were at least three separate entrances to the hallway connecting to the voting area. As discussed above, Russell reached the voting area by the hallway leading from the lobby. Additionally, voting employees could also reach the hallway leading to the designated voting area by entering the building from the Gold Booth area on the left side of the building or by entering the building from the vehicle service area on the right side of the building. Thus, during this brief period of time, none of these Union officials or agents had a direct view of the door leading to the voting area. Although these individuals may have seen voting employees entering the building from either side, there is no way that they would have known who was entering the building to vote or to attend to work related tasks. Under similar circumstances the Board has not found such conduct objectionable. See *J.P. Mascaro & Sons*, 345 NLRB No. 42, slip op. at 4 (2005).

The circumstances of the instant case are more analogous to those in *U-Haul Co. of Nevada*, 341 NLRB 195, 196 (2004); a case in which a union representative was present for approximately 35 minutes in a parking lot outside the building where an election was conducted. The Board found that while the union representative spoke with a "handful" of voters, the conduct was not objectionable, noting that the conversations took place outside the polling area, the waiting area, or near the line of voters.

The Board, supported by the Courts, has repeatedly found that the mere presence of
Union representatives at or near the polling area, absent evidence of coercion or other
objectionable conduct, is insufficient to warrant setting aside an election. *Harlan # 4 Coal Company v. NLRB*, 490 F.2d 117, 121-122 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974); *NLRB v. Connecticut Foundry*, 688 F.2d 871, 880 (2nd Cir. 1982); *Choctaw Provision Company, Inc.*, 122 NLRB 474 (1958); *Gastonia Combed Yarn Corp.*, 109 NLRB 585, 587
(1954).

The Employer's witnesses testified that Harper and Wallace engaged in a conversation outside the building near the vending machines after the election began at 10:00 a.m. The witnesses did not confirm that either Wallace or Harper spoke with anyone during the time that they were in the vending machine area. No witness identified any voting employee who passed by them to enter the building during this time. Although CSR Weaver recalled seeing Harper on the opposite side of the building for approximately 15 minutes, he was not facing the entrance to the building. She did not testify that any individuals passed by him to enter the building. Although Susino testified that Russell did not leave the Employer's property until 8 minutes after the beginning of the election, he did not testify that Russell spoke with anyone other than Harper and Wallace during this time. He did not testify that Russell spoke with any employees during this 8 minute period of time or that any employees even entered the building during this 8 minute period of time. Thus, even crediting all of the Employer's

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^{9 148} NLRB 1657 (1964).

witnesses, there is not sufficient evidence that Union officers, agents, or supporters formed a gauntlet through which employees were required to walk as they approached the voting area. Accordingly, there is no evidence of conduct that interfered with or precluded a free and fair election.

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Accordingly, for the reasons cited above, I recommend that Employer's Objection 2 be overruled in its entirety.

III. Summary of Conclusions

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As discussed above, the record evidence does not support a finding that there was conduct by Union officials, agents, or supporters that destroyed the laboratory conditions or interfered with the holding of a free and fair election among employees on August 30, 2007. Therefore, I recommend that the Employer's Objections to Conduct Affecting the Results of the Election be overruled in their entirety. Furthermore, I recommend¹⁰ that the Board certify the results of the election.

Dated, Washington, D.C. December 31, 2007

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Margaret B. Brakebusch Administrative Law Judge

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Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by January 14, 2008.